BELLA NOYA

IBLA 76-195 Decided August 2, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management rejecting Native allotment application AA-7313.

Set aside and remanded.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

   The substantial use and occupancy required under the Native Allotment Act must be achieved by the Native himself as an independent citizen (or family head) and such use must be at least potentially exclusive of others. Although a minor may initiate such use and occupancy, use and occupancy by a dependent accompanied by his parents does not qualify.

   Where a Native allotment application has been rejected, based on the guidelines of Oct. 18, 1973, on the basis that the applicant had not demonstrated 5 years use and occupancy of the land prior to the withdrawal affecting the land, and that requirement is abolished by Secretarial Order No. 3040, of May 25, 1979, the decision will be set aside and the case remanded for action.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

In 1975, Bella Noya filed an appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application AA 7313. The application was filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), and the pertinent regulations, 43 CFR 2561. (The Allotment Act was repealed by section 18(a), Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617(a) (1976)).

Native allotment appeals, including the one here under consideration, were continued pending decisions in several cases in the Ninth Circuit Court of Appeals. The decisions of the court in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), as refined by Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), make it appropriate to resume consideration of appeals pending before the Board involving the rights of Native allotment applicants.

The application here at issue was rejected for the stated reasons that (1) the lands located in protracted secs. 1 and 2, T. 31 S., R. 33 W., Seward meridian, were withdrawn from appropriation on May 10, 1958, by PLO No. 1634 which reserved the land as a wildlife refuge and breeding ground, and (2) appellant had not completed the 5- ear period of statutory use and occupancy prior to the effective date of the withdrawal. The decision below also recited that: "We must conclude that the applicant did not assert 5 years of independent control and use of the land prior to Public Land Order 1634, rather her use and occupancy was as a minor child in company with her parents (see Helen F. Smith, 15 IBLA 301 (1974))."

The Alaska Native Allotment Act, authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to an Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska and who is 21 years old or the head of a family. The Act authorized allotment only of "vacant, unappropriated and unreserved" public lands in Alaska. 43 U.S.C. §§ 270-1 (1970); 43 CFR 2561.0-3. An allotment applicant was obliged to make satisfactory proof to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years" in order to obtain an allotment. 43 U.S.C. §§ 270-3 (1970).

Appellant was born on May 12, 1943 and was thus 15 years old when the subject tract was withdrawn by PLO No. 1634. On her application, appellant claimed use and occupancy for berrypicking from July 1957.

Twice in 1974 appellant was requested by BLM to supply additional information which would demonstrate that she had completed 5 years of substantial use and occupancy prior to the withdrawal of the lands. In response, appellant submitted an affidavit stating she had lived on the land 3 years, but declining to indicate the year in which her residency had commenced. An affidavit submitted by appellant's half-brother stated that appellant had begun using the land in 1957, that she had used it with her parents, but that he (the affiant) had never seen her use the land.

Appellant's counsel has incoporated herein certain arguments advanced in Herman Joseph, 21 IBLA 199 (1975), reaffirmed in Herman Joseph (On Reconsideration), 22 IBLA 266 (1975). In Joseph, the Native allotment applicant asserted use and occupancy of land, commencing in 1959, which was included in an application for a power

site in 1963. The applicant there failed to demonstrate the 5-year use and occupancy prior to the effective date of the withdrawal, since the application for power purposes, upon its filing, withdrew the land pursuant to section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970).

Appellant has further incorporated herein, the arguments made in Sarah Pence, IBLA 76-74. Appellant there argued extensively that use and occupancy of the land by a minor does not bar the establishment of preference rights; that an applicant need not be either 21 years old or the head of a family until an allotment is granted. That neither the Allotment Act, regulations, nor Departmental guidelines impose age limits on initiation of use and occupancy; and that in any case, appellant, though a minor, was emancipated for purposes of use and occupancy of the land.

[1] The foregoing skirts the legal issue before us which is whether under the Native Allotment Act the appellant has completed substantial use and occupancy as an independent citizen or family head prior to the withdrawal of the land. Although earlier decisions e.g., Susie Ondola, 17 IBLA 359 (1974); Christian G. Anderson, 16 IBLA 56 (1974), embody the requirement of the Secretarial guidelines of October 18, 1973, that a NAtive must have initiated and completed substantial use and occupancy of the land for 5 years prior to a withdrawal or reservation, Secretarial Order No. 3040 of May 25, 1979, abolishes that 5-year requirement reciting in part:

> Sec. 3 Policy Decision. A. I have undertaken a review, with the Solicitor, of the five-year prior rule. I have approached the review from the premise that the Alaska Native Allotment Act was an act passed for the benefit of Natives and should, therefore, be liberally construed in favor of Natives. The Act itself does not contain the five-year prior rule as an express requirement. The policy appears to have originated as a result of the exercise of agency discretion. Since it was issued, however, the United States court of Appeals for the Ninth Circuit has ruled, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that the range of the Department's discretion in dealing with Native allotments is narrower than was previously supposed. Whether or not the five-year prior rule is a proper exercise of the Department's discretion, it is not consistent with my policy, that of liberally construing acts passed for the benefit of NAtives.
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> B. Accordingly, I hereby rescind the five-year prior rule in favor of a rule which merely requires that the full five years use and occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native

allotment or commenced use and occupancy prior to a withdrawal of the land.

At least one of the affidavits submitted tends to show that the appellant occupied the land as a dependent child in the company of her parents. While a minor may establish use and occupancy, such use must be established as an independent citizen in his or her own right and it must at least be potentially exclusive. Sarah F. Lindgren, 23 IBLA 174 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974).

The case does not contain a report of field examination which would hopefully cast some light on the extent and nature of appellant's use and occupancy. BLM is directed to reevaluate the application. If it concludes that the application should be rejected it shall initiate contest proceedings.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further appropriate action.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge